should gain a large following in the courts the world over. The liberality of such opinions as that of Judge Cardozo, must open the way to the ultimate effectiveness of international law.

EFFECT OF THE STATUTE OF LIMITATIONS UPON A GRANTOR'S [1] EXPRESS LIEN FOR THE PURCHASE PRICE. — It is customary in some states for the grantor of land to reserve in the deed a lien for the unpaid purchase price. A recent decision refuses, at the suit of a purchaser from a grantee, to remove the cloud on title caused by such a lien, after the Statute of Limitations had run upon the purchase debt.[2] The problem is twofold: First, is the lien enforceable after extinguishment of the debt? Secondly, even if it is not, will equity clear the title of one who purchased with knowledge of the debt? The authorities are divided on the first of these questions.[3] It is clear at the outset that no analogy can be drawn from doctrines of the "title" theory of mortgages.[4] For a vital factor in the case under discussion is that the creditor does not have legal title. A more profitable analogy is furnished by the lien which in some jurisdictions, in the absence of express agreement, is given an unpaid vendor.[5] It is true that this implied lien has often been attacked on the ground that it violates the Statute of Frauds and is opposed to the policy of the recording acts; [6] but those objections are obviated in the case of the express lien which appears directly in the chain of title.[7] It is overwhelmingly held that the former depends for its very life on the debt it was created to secure.[8] The express lien, which

[1] Since the term "vendor's lien" has become current in cases where legal title is retained for security, it seems advisable to restrict its use to that situation.

[2] Wilson *v.* Davis, 86 So. 686 (Fla.) (1920). For the facts of this case see RECENT CASES, p. 793, *infra*.

[3] In accord with the principal case: Hull's Administrator *v.* Hull's Heirs, 35 W. Va. 155, 13 S. E. 49 (1891). *Contra*, Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90 (1890). The federal courts follow the state law. Dupree *v.* Mansur, 214 U. S. 161 (1909).

[4] It is well settled that the mortgagee can foreclose after the debt is barred, in the title-theory states. Thayer *v.* Mann, 19 Pick. (Mass.) 535 (1837); Menzel *v.* Hinton, 132 N. C. 660, 44 S. E. 385 (1903); Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. 229 (1899). *Contra*, Harding *v.* Durand, 138 Ill. 515, 28 N. E. 948 (1891). See 2 JONES, MORTGAGES, 7 ed., §§ 1204, 1207. The same is true in the similar situation where the vendor retains legal title for security. Hardin *v.* Boyd, 113 U. S. 756 (1885); McGehee *v.* Blackwell, 28 Ark. 27 (1872). Since express reservation of a lien is in Texas considered as preventing title from passing, the cases there are governed by this rule. Ellis *v.* Hannay, 64 S. W. 684 (Tex. Civ. App.) (1901); Woodward *v.* Ross, 153 S. W. 158 (Tex. Civ. App.) (1913).

[5] Mackreth *v.* Symmons, 15 Ves. *329 (1808); Crampton *v.* Prince, 83 Ala. 246, 3 So. 519 (1888); see 1 PERRY, TRUSTS, 5 ed., § 232.

[6] Ahrend *v.* Odiorne, 118 Mass. 261 (1875); Philbrook *v.* Delano, 29 Me. 410 (1849). See 2 WARVELLE, VENDORS, 2 ed., § 679.

[7] All the statutes abolishing implied liens exempt express liens. See, for instance, 2 POLLARD, 1904 VIRGINIA CODE, § 2474; 1862 VERMONT GENERAL STATUTES, c. 65, § 33.

[8] Borst *v.* Corey, 15 N. Y. 505 (1857); Ilett *v.* Collins, 103 Ill. 74 (1882); Benedict *v.* Griffith, 92 Ark. 195, 122 S. W. 479 (1909); Shaylor *v.* Cloud, 63 Fla. 608, 57 So. 666 (1912). *Contra*, Baltimore & Ohio R. R. Co. *v.* Trimble, 51 Md. 99 (1878). This is now true in England. See 19 HALSBURY, LAWS OF ENGLAND, 14.

serves an identical purpose, may well be governed by the same principles. Another very striking analogy is found in cases where acceptance of a devise of land charged with a sum of money involves the assumption of a personal debt. It is held that this equitable charge cannot be enforced after the Statute of Limitations has run upon the debt.[9] These cases are particularly persuasive since in them the primary obligation was imposed directly upon the land. The prevailing view is, however, that the express reservation of a lien creates a situation akin to a mortgage in states where the title theory is not held.[10] Even if this view is to be followed the lien, in a number of states,[11] would none the less be unenforceable after the debt is barred.

Assuming that for one of these reasons the lien is no longer enforceable, the question remains, will equity remove the cloud on the plaintiff's title? There is a conflict of authority whether the lien, like the debt, is merely dormant and able to be revived by an acknowledgment. In California, where the idea that a mortgage lien is in no respect anything but security has been most completely developed, an acknowledgment which is effective as to the debt leaves the mortgage unenforceable.[12] Other states have a different rule; an acknowledgment by a purchaser from the mortgagor revives the lien.[13] But all agree that the *mortgagor* cannot, by restoring his own liability, resuscitate the lien as against one to whom he has conveyed.[14] The same principles should apply to a purchase from a grantee-debtor. Since the purchaser unambiguously shows, by bringing the action, that he will never make the acknowledgment, relief cannot be denied on the ground that the defendant has an inchoate right of which he should not be deprived.

Apart from this ground of decision there is some authority in the books for the rather indefinite principle that it would be inequitable to clear title as long as the debt is unpaid. So far as these are cases of common-

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[9] Loder *v.* Hatfield, 71 N. Y. 92 (1877); Yearly *v.* Long, 40 Oh. St. 27 (1883); Millington *v.* Hill, Fontaine & Co., 47 Ark. 301 (1886). *Contra*, Stringer *v.* Gamble, 155 Mich. 295, 118 N. W. 979 (1909).

[10] See Kyle *v.* Bellenger, 79 Ala. 516, 521 (1885); Talbot *v.* Roe, 171 Mo. 421, 432, 71 S. W. 682, 684 (1903); McKeown *v.* Collins, 38 Fla. 276, 289, 21 So. 103, 106 (1896). See 3 POMEROY, EQUITY JURISPRUDENCE, 4 ed., § 1257.

[11] Wells *v.* Harter, 56 Cal. 342 (1880); Allen *v.* Shepherd, 162 Ky. 756, 173 S. W. 135 (1915). *Contra*, Hulbert *v.* Clark, 128 N. Y. 295, 28 N. E. 638 (1891); Campbell *v.* Upton, 56 Neb. 385, 76 N. W. 910 (1898).

It might be argued that the express lien constitutes a contract to hold the land as security, specific performance of which will be given unless the promisee has been guilty of laches, and that the Statute of Limitations furnishes only a *prima facie* period. But even if the transaction is not considered as rather executed than executory, the promise can be no more than to mortgage the land; and the promise can have no greater effect than its performance. See Ray *v.* Ray, 24 Misc. 155, 53 N. Y. Supp. 300 (1898). The argument is certainly not applicable to the principal case, which came up on demurrer to a bill alleging laches.

[12] Wells *v.* Harter, *supra*. This and the cases in the succeeding notes deal with mortgage liens. If the analogy to the implied grantor's lien is taken, the argument will apply with even greater force.

[13] McLane *v.* Allison, 60 Kan. 441, 56 Pac. 747 (1899); Neosho Valley Investment Co. *v.* Huston, 61 Kan. 859, 59 Pac. 643 (1900); Fitzgerald *v.* Flanagan, 155 Ia. 217, 135 N. W. 738 (1912).

[14] Schmucker *v.* Sibert, 18 Kan. 104 (1877); Cook *v.* Prindle, 97 Ia. 464, 66 N. W. 781 (1896), reversing 63 N. W. 187 (1895).

law mortgages,[15] the result is undoubtedly correct. As has been seen the mortgage is still enforceable,[16] and no difference in result should follow from the fact that the parties are reversed. It is true, though, that the same doctrine has been applied to mortgage liens,[17] and even to the grantor's implied lien.[18] The contrary authority must be regarded as the better view.[19] Equity had never refused to clear a title acquired by adverse possession, even as against the former owner.[20] The situation is entirely different from that in the common-law mortgage cases; the plaintiff has a title which no one can dispute and is merely asking to have the *status quo* declared. Not to do so is of no benefit to the defendant, while it embarrasses the plaintiff and makes the land inalienable. With her rational conception of mortgages California takes this view. In two cases [21] the court has cleared the title of a purchaser from the debtor, distinguishing a prior case,[22] on the ground that there the conveyance was made before the statute had run. Since in none of the cases was the purchaser under a personal obligation, and in all knew that the land had been charged with the lien, the distinction shows a desire to avoid the former unfortunate decision. These cases should be followed and a similar result reached in a situation like that in the principal case.

TAXABILITY OF CAPITAL INCREMENT AS INCOME. — If property, held as an investment, is sold at a profit, may the profit constitutionally be taxed by the federal government as income? The answer, given by a unanimous court, is in the affirmative.[1] The legislative definition of income expressly included such profit; such definition was not unreason-

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[15] De Walsh *v.* Braman, 160 Ill. 415, 43 N. E. 597 (1896); Jenkins *v.* Andover Theological Seminary, 205 Mass. 376, 91 N. E. 552 (1910).

[16] See note 4, *supra*.

[17] Sturdivant *v.* McCorley, 83 Ark. 278, 103 S. W. 732 (1907); Barney *v.* Chamberlain, 85 Neb. 785, 124 N. W. 482 (1910); Keller *v.* Souther, 26 N. D. 358, 144 N. W. 671 (1913). See 1 POMEROY, EQUITY JURISPRUDENCE, 4 ed., §§ 386, 393.

[18] Cassell *v.* Lowry, 164 Ind. 1, 72 N. E. 640 (1904).

[19] Kingman *v.* Sinclair, 80 Mich. 427, 45 N. W. 187 (1890); Cushing *v.* Spokane, 45 Wash. 193, 87 Pac. 1121 (1906) (tax lien); Boyd *v.* Buchanan, 176 Mo. App. 56, 162 S. W. 1075 (1914) (*semble*).

In those states where a mortgage lien is enforceable after the debt is barred it will follow that equity will not clear the title just as it will not where the title theory of mortgages is held. Any objection to the refusal to clear the cloud on title in those states must then be based on objections to the doctrine that the mortgage is enforceable after the debt is barred.

[20] Alexander *v.* Pendleton, 3 Curt. (U. S.) 221 (1814); Arrington *v.* Liscom, 34 Cal. 365 (1868).

[21] Faxon *v.* All Persons, 166 Cal. 707, 137 Pac. 919 (1913); Muhs *v.* Hibernia Savings & Loan Society, 166 Cal. 760, 138 Pac. 352 (1914).

[22] Burns *v.* Hiatt, 149 Cal. 617, 87 Pac. 196 (1906).

[1] Merchants' Loan and Trust Co. *v.* Smietanka, U. S. Sup. Ct., October Term, 1920, No. 608. In this case trustees held stock the value of which on March 1, 1913, was $561,798 and which they sold in 1917 for $1,280,996. The federal income tax was assessed on the difference between these two sums as income for the year 1917. The trustees claimed that this profit on sale was not "income" within the meaning of that term as used in the Sixteenth Amendment to the Constitution. The court held that the tax was properly assessed.